No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DE BON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTIONS.

This is an appeal by Ed De Bon, a defendant below, from a judgment of conviction (R. 20), following a verdict of guilt, on counts one and three of an indictment, the first charging him, jointly with defendants Osaki and Hildebrand, with conspiring to make and file false applications with the War Assets Administration to purchase surplus war materials, in violation of Title 18, U.S.C.A., Section 88, and the third with the substantive offense of making false mail order requests to said agency and concealing therein that automobiles were being purchased for the appellant, in violation of Title 18, U.S.C.A., Section 80.

The appellant was indicted (R. 2), arraigned in the trial Court and entered a not guilty plea to the charges

preferred against him. (R. 11.) His co-defendants pleaded guilty to the charges, one being fined (R. 212) and the other placed on probation and fined. (R. 214.) He was tried by a jury. He moved for a dismissal of the proceeding at the close of the prosecution's case and at the close of the defendant's case, both motions being denied. (R. 13.) Thereafter the jury returned its verdict finding appellant guilty of violations of counts one and three of the indictment and not guilty of count two thereof. (R. 16.) Thereupon he moved in arrest of judgment and said motion was denied. (R. 14, 19.) Thereafter, the trial Court sentenced him to six months in the county jail on count one, the sentence being suspended and appellant ordered placed on probation for two years and fined him $2500 on said count and $2500 on count three, the judgment and sentence to run consecutively. (R. 216.) Thereafter the appellant moved for a new trial which was denied. (R. 19.) Thereafter he initiated this appeal from the judgment of conviction, sentence, probation order and fines. (R. 22.)

STATUTORY PROVISIONS SUSTAINING JURISDICTIONS OF COURTS.

The District Court below had jurisdiction of this case by virtue of the provisions of Title 28 U.S.C.A., Sections 80 and 88, and 41, subd. 2, and the appeal was taken to this Court under Rules 37, 38 and 39 of the Rules of Criminal Procedure for the District Courts of the United States.

This Court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C.A., Section 225, subd. (a) first and third and subd. (d).

The pleadings necessary to show the existence of the jurisdictions are the indictment (R. 2), plea of not guilty (R. 11), the verdict (R. 16) and the judgment, sentence and fines. (R. 20.) The facts disclosing the basis upon which the Court below had and this Court has jurisdiction to review its judgment on appeal are set forth in the statement of the case herein with particularity and record page references.

STATUTES, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

One

Title 18 U.S.C.A., Section 88, which reads as follows:

> "88. Conspiring to Commit Offense Against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Two

The applicable part of Title 18 U.S.C.A., Section 80, reading as follows:

"80. PRESENTING FALSE CLAIMS, AIDING IN OBTAINING PAYMENT THEREOF.—

" * * * whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, * * * in any manner within the jurisdiction of any department or agency of the United States * * *, shall be fined not more than $10,000 or imprisoned not more than ten years."

STATEMENT OF THE CASE.

THE APPLICATIONS.

Hildebrand, a war veteran, was engaged in the used car business with his war veteran partner, Tom P. Mee of Bakersfield (R. 82), and as such they were authorized to purchase surplus property from the WAA as licensed "veteran dealers". (R. 57, 87, 90.) He had exhausted only $2,000 of the $25,000 priority rights he was entitled to receive individually. (R. 82, 83.) This partnership continued to September, 1946. (R. 87.) Both partners were certified to the WAA as "veteran dealers". (R. 87, 90.) Hildebrand was such a dealer when he first met De Bon on July 8, 1946 (R. 90), and was introduced to him as such a dealer. (R. 142, 154.) De Bon dealt with Hildebrand as such a dealer. (R. 154, 150.) On prior occasions Hildebrand had been in the habit of obtaining surplus property on his own priorities and turning it over to his employer-partner Mr. Mee for resale purposes. (R. 80-81-87.)

Hildebrand talked to Osaki, a veteran friend who had a $25,000 priority right, a few months before March, 1946, evidently on or about December 11, 1945 (R. 31, 90, 92), for on that date Osaki had applied in writing to the WAA for the purchase of surplus property (R. 54, 92, 93; Exh. 13), and had been given his priority status but had not used his priority rights. (R. 92, 58.) Hildebrand suggested to Osaki that he should exercise the right to use the residue of his priority rights. (R. 33.) Osaki agreed to use it. (R. 32.) Pursuant thereto in March, 1946, Osaki signed a "Supplemental Veteran's Application for Surplus Property" (*Exh. 14;* R. 31, 32, 92, 93, 94, 95), dated March 27, 1946. (R. 32, 54.) Both Osaki and Hildebrand filled out this form. (R. 32, 35, 54, 56, 92, 93, 95, 96.) Paragraph 18 of that form contained a statement that the applicant was not procuring the property for resale purposes. (R. 261.) *If this document contained false statements and data* (R. 88) *it was placed thereon by Hildebrand and Osaki.* (R. 55, 56, 93, 94, 95, 96.) This form was presented by Osaki and Hildebrand to the certification section of the WAA (R. 36) for certain items, viz., 3 White van trucks, and delivered to Osaki pink slip priorities (Exh. 6, R. 36, 36) for certain items, viz., 3 white van trucks listed in the application, and Osaki delivered these to Hildebrand (R. 8, 96) who "threw them in the glove compartment" of his own car. (R. 36.) Hildebrand once had worked for the WAA. (R. 53.) The two, Hildebrand and Osaki, had discussed and expected that they would go into business sometime in

the future and then make use of the priorities. (R. 36, 37, 57.) They did not abandon getting the property described in that application until months later (R. 57), probably in April 1946. Neither Osaki nor Hildebrand was acquainted with the appellant De Bon during this period of time. Hildebrand first became acquainted with De Bon in July, 1946. (R. 40, 53, 57, 38, 39, 45.) Osaki first met De Bon on July 24, 1946. (R. 127, 128, 142.)

Hildebrand first met De Bon, a dealer in automobiles, in the WAA office at 30 Van Ness Avenue, San Francisco, on July 8, 1946. (R. 40, 138, 139.) He was introduced as a "veteran dealer" to De Bon (R. 142) and told De Bon he had a partner. (R. 154.) Hildebrand testified that at this time, "I believe it came around that he (De Bon) wanted me to get him some units that were in the sale, if I could exercise a priority" (R. 40), and that he stated, "I told him I would try". (R. 42.) De Bon had signified an interest in two Chevrolet gunnery trucks and in a number of White van trucks which were listed in WAA brochures, *Exhs. 11 and 12.* (R. 42, 49, 50, 59, 139.) De Bon was willing to pay him a profit of $50 apiece if he acquired and would sell him two Chevrolet trucks (R. 80) and $500 for three White van trucks (R. 82) if he, as a veteran dealer, got them and sold them to him. Thereupon, Hildebrand, without informing De Bon, went alone to the WAA office across the street at 1540 Market Street where he filled out and submitted two applications, that is to say, "Mail Order Requests For Surplus Property". *Exhs.* 1 and

5; (R. 42, 43.) *There are no false statements in either of these requests.* Unless it be contended that Osaki was not to receive title thereto from the WAA which, obviously, is not the case, the requests neither expressly nor impliedly were false. The first *(Exh. 1)* was prepared and filed with the WAA by Hildebrand in Osaki's name (R. *43*) and the second (Exh. 5) by Hildebrand and this later was ratified by Osaki. (R. *44.*) Neither Osaki nor Hildebrand at any time informed De Bon that either or both of them had made the prior Veteran's Application and Veteran's Supplemental Application for surplus war material, and neither at any time informed him of the making or filing of any mail order requests. Hildebrand testified that "all I told Mr. De Bon was that all that I could do was to put in for the units and just hope to get them, that was all". (R. 63.) De Bon never knew, heard, saw or authorized the making or filing of these requests. There is not an iota of evidence in the record from which the contrary could even be inferred.

The Mail Order Requests.

The first of these mail order requests, viz., *Exh. 1,* was for a Chevrolet gunnery truck, mentioned in Counts One and Two of the indictment, which was a unit left over after the WAA sale had been concluded and which none of the veterans wanted. (R. 41, 42.) It was available as a left over after-sale unit (R. 42) and, therefore, apparently open to purchase by non-veterans. This request was signed in the name of "Oscar Osaki" by Hildebrand who placed his own

initials, "JDH", immediately following the signature. (R. 43.) At the time Hildebrand had not consulted Osaki about the use of his name but he did so that night and obtained Osaki's oral consent thereto. (R. 43, 44.) The next day, July 9, 1946, Osaki went to the WAA office and there signed Disposal Document 10, dated July 8, 1946, *Exh. 2,* as a buyer. Copies thereof (Exh. 3) were signed in his name by WAA officers. *Exh. 3* carries the notation that on July 9, 1946, $1125.96 was paid for the Chevrolet gunnery truck. Oral evidence shows that Osaki paid this sum for the truck through the medium of a cashier's check endorsed by De Bon payable to the Treasurer of the United States which De Bon had delivered to Hildebrand who delivered it to him. He paid this to the WAA, as per invoice. (R. 48, 64.) The WAA issued a bill of sale to Osaki dated July 8, 1946, covering the purchase. See *Exh. 4.* On July 9, 1946, Hildebrand told Osaki he had sold the truck to De Bon (R. 100), and, at Hildebrand's request, Osaki thereupon executed a bill of sale to De Bon (R. 150) which was delivered to De Bon by Hildebrand and De Bon got possession. Thereafter De Bon paid Hildebrand a profit of $50 for this sale to him. (R. 48.) De Bon never knew that Osaki's personal priorities had been used to procure this Chevrolet truck. (R. 150.) He thought he was dealing with an authorized veteran dealer (Hildebrand) whom he had been informed had a partner. (R. 150, 82, 57, 87, 90.) De Bon used the truck in his business. (R. 141.) Several days after the sale Hildebrand voluntarily gave Osaki either $15

or $25. (R. 100, 122, 126.) De Bon never had any knowledge of this division of profits until sometime after the sale of this item and of the three White trucks had been consummated. (R. 67.) De Bon later sold this Chevrolet truck to Laurence J. Risling. See *Exh.* 15.

The second of these mail order requests, viz., *Exh. 5,* was for White van trucks, mentioned in Counts One and Three of the indictment. Whether or not these trucks were "after sale units" or not and whether available to purchase by non-veterans or were restricted to veterans does not appear from the evidence. This request then and there was signed, on July 8, 1946, in the name of "Oscar Osaki" by Hildebrand who did not then have Osaki's permission to sign his name thereto but who obtained his permission that night (R. 51, 74), or, according to Osaki, several days later. (R. 100.) In any event Osaki gave Hildebrand his oral consent to apply for *one* White truck and later was astounded to learn from a notice he received from the WAA that he had been awarded three (3) White trucks (R. 101), but he, nevertheless, went to the WAA office, signed three Disposal Documents No. 10, *Exh. 8,* on July 17, 1946. *Exhibit 9* containing copies of said disposal documents are WAA copies of Exh. 8. Exh. 7 is a WAA memo concerning Osaki's desire to purchase three trucks. At the request of Hildebrand, he met Hildebrand and also De Bon at the WAA office at 30 Van Ness Ave., San Francisco, on July 24, 1946. This was the first time Osaki met De Bon. (R. 101.) Hildebrand delivered to Osaki three

Bank of America cashier's checks each in the sum of $3629 drawn payable on July 24, 1946, to De Bon's order and bearing endorsements by him payable to the order of the Treasury of the United States which De Bon had delivered to him. (Exhs. 16, 17, and 18; R. 101, 103, 104, 143.) Osaki bought the trucks. (R. 115.) Osaki paid the WAA for these trucks and received from the WAA three Bills of Sale from the WAA to Osaki for the three (3) White van trucks. See *Exh. 10.* Thereafter Osaki executed a notarized bill of sale to De Bon (R. 101, 102, 143) covering the transfer. De Bon had no knowledge that Osaki's personal priorities had been used to obtain these trucks. (R. 150.) He had been informed (R. 142) and believed he was dealing with an authorized veteran dealer. (R. 150, 82, 57, 87, 90.)

Thereafter De Bon paid Hildebrand a profit of $580 on the sale of the three White trucks. (R. 140, Exh. 19.) Later Hildebrand gave Osaki $120. (R. 108, 109, 122, 126.) De Bon had no knowledge that Hildebrand was dividing his profits with Osaki. (R. 67.)

The appellant was indicted, tried by jury and found guilty, sentenced, fined and placed on probation, as hereinabove stated, and appealed from said judgment.

QUESTION INVOLVED.

1. Where two war veterans partners, one of whom held his firm out to the appellant to be a "veteran dealer", had made and filed a false Supplemental Vet-

eran's Application with the WAA to procure automobiles from its stock of surplus war material and the veteran dealer long thereafter, with the acquiescence of his partner, agreed to sell a Chevrolet gunnery truck and three White van trucks to the appellant and thereafter, through the medium of a mail order request, which contained no false statements but was filed by the veteran dealer with the WAA in the name of his partner, procured several cars and sold four of them to the appellant, a stranger, is the appellant guilty of a conspiracy to make and cause that false application to be made, in violation of 18 USCA 88, or of the substantive offense of making and causing a false Mail Order Request for the three White van trucks to be made or concealing therein that the veteran was purchasing for resale purposes, in violation of 8 USCA 80, when the purchaser neither participated in nor had notice or knowledge of the making, filing or false contents of that Application or of the Mail Order Request?

2. Isn't a judgment of conviction, punishment and fine meted out under both statutes void for duplicity and for double jeopardy where the two counts charge the persons, times and places constituting the gravamen of the offense are the same?

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED UPON.

1. The trial Court erred in denying appellant's motion for his acquittal made at the conclusion of the prosecution's evidence. (R. 13.)

2. The trial Court erred in denying appellant's motion for his acquittal made at the conclusion of the testimony. (R. 13.)

3. The trial Court erred in denying appellant's motion for a directed verdict. (R. 13.)

4. The trial Court erred in denying appellant's motion in arrest of judgment upon the ground the indictment did not state facts sufficient to constitute an offense against the U. S. (R. 15, 17, 19.)

5. The trial Court erred in denying appellant's motion for a new trial upon each and all of the grounds therein mentioned. (R. 18, 19.)

6. The jury erred in returning a verdict of guilty on Counts One and Three of the indictment. (R. 16.)

7. The trial Court erred in entering a judgment of guilty against the appellant on Counts One and Three. (R. 20.)

8. The trial Court erred in sentencing the appellant to six months in the County Jail on Count One which sentence was suspended and appellant ordered on probation for two years and fining him $2500 thereon and in fining him $2500 on Count Three, the judgment and sentence to run concurrently, the judgment of conviction, sentence and fine on Count One and the judgment of conviction and fine on Count Three being void for placing him in double jeopardy, for inflicting double punishment upon him and for being excessive and duplicitous, in violation of the 8th and 5th Amendments. (R. 20, 22.)

9. The trial Court erred in failing to declare a mistrial and in permitting the case to go to the jury and in failing to grant a new trial because of the misconduct of counsel for the prosecution suggesting in his summation to the jury that the appellant was guilty of conspiracies other than that charged in the indictment which misconduct was prejudicial to and materially affected his substantial rights and deprived him of a fair trial in violation of the provisions of the 6th Amendment and the guaranty of due process contained in the 5th Amendment. (R. 226.)

10. The trial Court erred in refusing to give appellant's instruction that the testimony of codefendants who had pleaded guilty was to be viewed with caution. (R. 212.)

11. The trial Court erred in refusing to give appellant's instruction that it was not a violation of the Surplus Property Act for the appellant to purchase property from a veteran having title thereto. (R. 196.)

12. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could buy surplus property on his priority and sell to a nonveteran at a profit. (R. 202.)

13. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could sell purchased surplus property to a third person for a profit or for a commission. (R. 205.)

14. The trial Court erred in instructing the jury that one who aids and abets an offense is criminally liable as a principal. (R. 185-6.)

15. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that an innocent purchaser from a veteran dealer or from a veteran who held himself out to be such a dealer could pay such a dealer a profit on a purchase from him without being culpable or guilty on the charges contained in the indictment. (R. 205.)

16. The verdict of guilty on Counts One and Three and the entry of judgment and sentence thereon are void for each of the counts in the indictment fails to state facts sufficient to constitute an offense, to-wit, Count One fails to state in what particular respects, if any, the Applications therein charged were false and, Count Three fails to state in what particular respects, if any, the mail order request therein mentioned was false.

17. The judgment is contrary to law.

18. The judgment is contrary to the facts.

19. The evidence is insufficient to sustain the judgment of conviction, sentence and fines.

ARGUMENT.

WHAT THE COUNTS CHARGE.

Count One.

Count 1 charges that the appellant, jointly with the two war veterans, in violation of 18 USCA, sec. 88, conspired "to defraud the United States", the object of the conspiracy being "to make and cause to be made, present and cause to be presented,—false and

fraudulent applications" by veterans for "the purchase of surplus war materials from the War Assets Corporation" in violation of a specific agreement with said agency that the purchase thereof was not for resale purposes. (R. 3-4.)

Count Three.

The gist of the charge in Count Three is that the appellant, in violation of 18 USCA, sec. 80, jointly with the two war veterans, on or about July 8, 1946, at San Francisco,

> "did knowingly and wilfully make *and* cause to be made false, fraudulent and misleading statements and representations, and did conceal and cover up by scheme and device a material fact in a matter within the jurisdiction of * * * the War Assets Administration, in that the said defendants did cause to be executed a mail order request for the purchase" of three 'White van trucks', purporting to be for defendant Osaki but, in reality, 'for the use and benefit of the defendant, Ed De Bon'."

I.

THERE IS NO EVIDENCE THAT THE DEFENDANT DEFRAUDED OR CONSPIRED TO DEFRAUD THE GOVERNMENT.

Title 18 USCA, sec. 80, defines a substantive offense and sec. 88 defines a conspiracy to violate that substantive statute.

It is significant that the indictment fails to allege specifically what statement or statements, if any, in the "Veteran's Application for Surplus Property",

the "Supplemental Veteran's Application for Surplus Property" or the "Mail Order Request" were false, or what material facts, if any, therein were concealed. In consequence, the indictment fails to state any offense against the United States. See *Hammer v. U. S.* (CCA 5), 134 Fed. (2d) 592, 595.

There is no evidence in the record which would cure these material omissions in the indictment if they were curable by proof on those issues. There is no evidence that the Government was defrauded of any property. Osaki was entitled to purchase the property and to pass title to a third person. A valid sale by the Government to the veteran Osaki for a lawful consideration passed title to Osaki and involved no element of fraud. The Government received what it was entitled to receive, viz., the purchase price. In consequence, the Government could not assert it had been defrauded.

Count Three alleges conjunctively that the defendants did "make and cause to be made" a false statement *and* did conceal "a material fact" within the jurisdiction of the WAA in executing a mail order request for the purchase of 3 White van trucks, purportedly for the veteran Osaki but with intent to purchase the trucks for De Bon. The count is void for duplicity.

The allegations in Count Three are insufficient on their face to state an offense. Osaki was entitled to purchase the three trucks and did so. Title thereto passed to Osaki and he passed title to De Bon. The

defendant De Bon neither made an application for these trucks nor executed any mail order request for them. The count contains an allegation that the defendants made a false statement but fails to state the nature of that statement and therefore fails to state an offense. It also contains no allegation of the nature of the "material fact" which was concealed and therefore fails to state an offense. The materiality of either a fraudulent statement or of a concealment must be affirmatively alleged with particularity and, in addition thereto, must be proved to sustain a conviction. It is significant that nowhere in Count Three is the nature of the false statement set forth or its materiality alleged. The count therefore fails to state an offense.

There is no proof in the record that De Bon had anything to do with the making of the mail order request or knew that it had been made. The evidence indicates the contrary. There is no evidence in the record that the mail order request was false in any material respect or that there was any concealment of a material fact therein. There was no duty upon Osaki to state therein that at the time he applied to purchase that he intended to resell the trucks at that time or at any future time. The question whether he then or later intended to resell the trucks is entirely immaterial insofar as Title 18 USCA, sec. 80, is concerned.

Title 18 USCA, sec. 80, is a "fraud" statute. Fraud includes the element of "materiality". *Twachtman v. Connelly* (CCA-6), 106 Fed. (2d) 501, 506. In conse-

quence, it is apparent that the nature of the fraud perpetrated or the concealment made must be affirmatively alleged in order for the count to state a federal offense.

Further, before the 1934 amendment, Title 18 USCA, sec. 80, required the Government to allege and also prove that it had sustained a definite loss of money or other property in order to demonstrate the commission of a crime. The 1934 amendment removed that restriction. See *U. S. v. Mellon* (CCA-2), 96 Fed. (2d) 462, 463. However, no authority has held that the amendment changed the nature of the statute from one for fraud to one for perjury requiring no oath. The essence of perjury is the *oath* whereas the essence of fraud or of concealment is *loss*. See *Rick v. U. S.* (CCA-D.C.), 161 Fed. (2d) 897, 898, stating:

> "Under well established principles of law, 'fraudulent' includes an intent and involves a subject matter of which someone is to be deprived."

It is evident, therefore, that if the Government no longer must prove actual pecuniary or property loss it nevertheless must allege and also prove a special detriment suffered by it or some other entity. Inasmuch as no pecuniary or property loss or detriment is alleged or proved by the Government to have been occasioned Count Three falls and, inasmuch as Count One merely alleges a conspiracy to violate the substantive statute (Title 18 USCA, sec. 80) it also falls for like reasons.

If Title 18 USCA, sec. 80, did not require allegations and proof of detriment suffered then, of course, every verbal and written statement made which could be encompassed by that statute which was not literally and precisely true and accurate would constitute a crime. Every argument made by attorneys in court and every pleading and brief filed which contained inaccuracies, theories and interpretations incapable of final judicial acceptance would render the attorneys liable to an indictment under that statute and their only hope against a conviction would be their ability to persuade a jury or judge that they were wanting in criminal intent. For like reasons judges themselves would be placed in a somewhat precarious position under the statute and might hesitate to express their views on the law and facts and would avoid written opinions. It were strange were counsel and courts compelled to be mute for fear of indictment. If the statute is to be so all-embracive as not to require a detriment to have been suffered as a condition precedent to conviction we suppose that all civil and criminal proceedings must come to a halt simply upon the ground that the duties of lawyers and judges have become too risky.

II.

THERE IS NO EVIDENCE THAT DE BON CONSPIRED TO MAKE FALSE APPLICATIONS OR THAT HE MADE FALSE MAIL ORDER REQUESTS.

(Conspiracy Count One.)

De Bon never had any knowledge that Osaki had filed a Veteran's Application for Surplus Property (Exh. 13) on December 11, 1945, or that Osaki and Hildebrand had filed a false Supplemental Veteran's Application for Surplus Property (Exh. 14) on March 27, 1946. (R. 88, 55, 56, 92, 96.) Neither Osaki nor Hildebrand were acquainted with De Bon at those times. Hildebrand first met De Bon four months later on July 8, 1946 (R. 40, 53, 57, 138, 139, 145), and Osaki first met De Bon on July 24, 1946. (R. 127, 128, 142.) There is not an iota of evidence in the record that De Bon at any time whatever was informed or knew or had any reason to know or any chance to know that any such applications had been filed with the WAA. The crime of making the false application, if it was false, was committed alone by Osaki on December 11, 1945. (See Exh. 13 and R. 92, 93.) The conspiracy of making the admittedly false Supplemental Application was committed by Hildebrand and Osaki on March 27, 1946. (See Exh. 14, and R. 31, 32, 54, 92-95.) A conspiracy to make either of said applications necessarily was completed on the dates when those documents were prepared and filed with the WAA. On neither of those dates was De Bon acquainted with either of them. He first met Hildebrand four months later, on July 8, 1946, and first met

Osaki on July 24, 1946. It was impossible, therefore, for De Bon to have had anything to do with either of those documents and it was impossible for him to have joined in any conspiracy in their making and filing. In consequence, the conviction against him on Count One cannot stand. The appellant's motion for acquittal made at the close of the prosecution's evidence, the like motion made at the close of the evidence and his motion for a directed verdict should have been granted for insufficiency of the evidence. So likewise should his motion for a new trial. See *Muyres v. U. S.* (CCA-9), 89 Fed. (2d) 784.

If it was the theory of the prosecution, as evidenced by the contents of Count One, that Osaki, Hildebrand and De Bon jointly conspired in March, 1946, to file false Applications for Surplus Property with the WAA and that such a conspiracy continued for approximately five months thereafter until Osaki thereafter obtained the Chevrolet gunnery truck and three White van trucks and sold them to De Bon, who thereupon became a party to an unlawful agreement, the evidence completely disproves any such conspiracy. The gravamen of the conspiracy charge is making of false applications which was completed on March 27, 1946. (See Exh. 14.) For such a theory to be applied the evidence would have to show De Bon had knowledge of the falsity and agreed to enter into a conspiracy. There is no evidence of any such knowledge and none of any such agreement which is essential to sustain a charge of conspiracy against De Bon.

If there was any conspiracy to file false applications only Osaki and Hildebrand were involved for neither was acquainted with De Bon at the times they were made and filed. If the prosecution's theory was that the conspiracy was formed by them and continued for some four months thereafter and then was re-opened so as to include De Bon as a joint conspirator and continued thereafter until Osaki passed good title to the items to De Bon or became an independent conspiracy no such charge was contained in the indictment and the evidence does not bear out any such contention.

The only acts which De Bon performed were those of agreeing to buy cars from Hildebrand who held himself out to be a member of a partnership in the used car business with a Mr. Mee of Bakersfield (who turned out to be Osaki) and led him to believe that as such a veteran dealer in used cars, he was authorized to purchase surplus war assets for resale purposes. Hildebrand had not exhausted his own priority rights as a veteran dealer but had used only $2,000 of the $25,000 rights he was entitled to. (R. 82, 83.) If these be deemed overt acts the conspiracy statute, nevertheless, was not violated by De Bon for there is no evidence in the record that he joined in any unlawful agreement. The statute is not violated by one who does not join in a conspiracy agreement. See *Marino v. U. S.* (CCA-9), 91 Fed. (2d) 691, 695; *Muyres v. U. S.* (CCA-9), 89 Fed. (2d) 784. The wrongful acts of Osaki, if they were wrong, in making the application of December 11, 1945, (Exh. 13) and the joint

making by Hildebrand and Osaki of the false Supplemental Application of March 27, 1946 (Exh. 14), long before De Bon met either Osaki or Hildebrand, is not admissible against and could not link De Bon with any wrongdoing for he had no knowledge thereof and no connection therewith and did not know either of those persons. See *Wilson v. U. S.* (CCA-6), 109 Fed. (2d) 895, 896.

If the indictment is construed to charge one single continuing conspiracy to file false applications not a shred of evidence connects De Bon with any such matter. If the prosecution had proved other conspiracies on the part of any of the defendants, such as conspiring to file false mail order requests, such evidence would not sustain the single conspiracy charged for such would be a variance between charge and proof. See *Blumenthal v. U. S.*, 92 L. Ed. Adv. 183, 188; *Berger v. U. S.*, 295 U. S. 78, 81-82, and *Marcante v. U. S.* (CCA-10), 49 Fed. (2d) 156, 157-158.

Further, the rule is that evidence to convict in a conspiracy case must be so clear and convincing as to leave no reasonable doubt as to guilt. *U. S. v. Silva* (CCA-2), 131 Fed. (2d) 247, 249. The conclusions to be drawn from circumstantial evidence of a conspiracy must exclude every other reasonable hypothesis than that of guilt. *Copeland v. U. S.* (CCA-5), 90 Fed. (2d) 78, 79. There is no evidence whatever linking De Bon with the making of the applications and mail order requests. Under the test of these rules De Bon was not guilty of Counts One or Three.

(Substantive Count Three.)

If the mail order requests (Exhs. 1 and 5 both dated July 8, 1946), made by Osaki and Hildebrand, were false in any respect it could be only in the fact that Hildebrand, in signing Osaki's name thereto and later receiving Osaki's oral approval thereof, did not disclose therein that Osaki (and Hildebrand, his patrner) intended to resell the items which might be awarded to Osaki thereunder. However, nothing in these mail order request forms supplied by the WAA required any such disclosure therein. (See Exhs. 1 and 3.) Such a requirement appears, in negative form, in the Veteran's Application for Surplus Property form which contains a statement the veteran is applying for property for specific uses. (See Exhs. 13 and 14.) However, De Bon did not meet Osaki until introduced to Osaki by Hildebrand on July 24, 1946, when Osaki executed bills of sale to him. (R. 101, 102.) Up to that moment and thereafter De Bon thought he was dealing with Hildebrand who led him to believe he (Hildebrand) was an authorized veteran dealer in used cars with a partner in that business named Mee. Neither Hildebrand nor Osaki ever informed De Bon that any such mail order requests had been made and there is no evidence in the record that he had any such knowledge that any such requests were required by the WAA to be made or of the contents of such requests.

III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT OF CONNECTION.

(Conspiracy Count One.)

In order to connect De Bon with a conspiracy it is essential for the prosecution to prove that he had knowledge of the conspiracy and intent to commit a wrongful act.

Lee v. U. S. (CCA-9), 106 Fed. (2d) 906, 907;
U. S. v. Gerke (CCA-3), 125 Fed. (2d) 243, 246;
Egan v. U. S. (CCA-8), 137 Fed. (2d) 369, 378;
U. S. v. Mellon (CCA-2), 96 Fed. (2d) 462, 464.

Inasmuch as the record reveals that De Bon had no knowledge of the making or of the contents of either of the applications conspiracy Count One falls as to him for a want of knowledge and intent. The burden of proof rested on the prosecution to prove criminal intent or to show facts from which such intent could be presumed. See *Piquett v. U. S.* (CCA-7), 81 Fed. (2d) 75, 81, cert. den. 56 S. Ct. 749; *Minner v. U. S.* (CCA-10), 57 Fed. (2d) 506, 512; *U. S. v. Schultze* (De-Ky.), 28 F.S. 234, 235, and rule, in 22 C.J.S. 883, sec. 568. The prosecution failed to sustain that burden on the conspiracy and substantive charges of Counts One and Three.

(Substantive Count Three.)

The rule as to the substantive charge in Count Three is that the prosecution must prove that the mail order request for the three White trucks were made by De Bon, that the request was false in a material respect

and that he had knowledge of the falsity. See *U. S. v. Jennison* (CCA-Kans.), Fed. Cas. No. 15,475, 1 McCrary 226, *U. S. v. Miskell* (CC-Ky.), 15 Fed. 369, 370. The evidence is conclusive that Hildebrand personally, without the knowledge of Osaki or De Bon, prepared both mail order requests (Exhs. 1 and 5), and later had Osaki orally approve his making of these requests. (R. 43-44, covering Exh. 1, and R. 51, 74, 100 covering Exh. 5.) De Bon did not participate therein.

IV.

PROOF OF ELEMENTS ESSENTIAL TO CRIME IS LACKING.

The prosecution failed to establish that there was any prohibition against the cars being purchased for resale purposes to any person, whether a veteran or non-veteran. There is no evidence that the sale by the WAA was restricted to veterans or that there was any prohibition against resale to a non-veteran. In consequence, Osaki was not duty bound to disclose that he was buying for the purpose of reselling to De Bon and the request, therefore, was true and not false since he was buying for himself for resale purposes. No such requirement appears on the Mail Order Request.

Under the Surplus Property Act of 1944, 50 USC Appendix, sec. 1625(b) the Administrator was authorized to set aside surplus property "for exclusive disposal to veterans for their own personal use, and to enable them to establish and maintain their own small business, professional, or agricultural enterprises. Un-

der the regulations set up by the Administrator, as under the statute, property could be sold to veterans for resale purposes. A characteristic example of notices annexed to applications to purchase for personal use or for resale purposes, although not offered in evidence at the trial below, reads as follows:

> *"Applications Dealing for Property Not For Resale*
>
> If the items requested are for use in your own small business, submit a signed statement to that effect and return with your application.
>
> *Applications Dealing for Property To Be Resold*
>
> To establish your status as a veteran dealer, you must furnish in addition to the attached application as an incorporation thereof the following listed supplemental evidence:
>
> (a) A letter on the stationery and over the signature of a representative of your Bank.
>
> The above letter must include a statement to the effect that the writer has evidence that you are, or will be engaged in business requiring the property sought, and that you are financially responsible for the property requested.
>
> (b) A certified or photostatic copy of lease or rental agreement, or other evidence of your control of warehouse or storage space sufficient to house the property desired.
>
> (c) A certified or photostatic copy of licenses required by law to operate your business.
>
> For your information, in accordance with the Surplus Property Act, veterans purchasing items for

> resale in their business may use their veterans priority to purchase only *one initial stock*. Further stocks for 'resale' will be sold to veteran dealers on the same basis as to non-veteran dealers in the commodity involved. This limits you to *one application*. Each item requested must show the dollar value you are willing to expend to purchase this item."

There is no doubt that De Bon thought he was dealing with a duly licensed veteran dealer in used cars. Further, there is no evidence in the case that the sales of the Chevrolet or the White van trucks were restricted to veterans under a prohibition against resale or that the Chevrolet was a left-over unit and there is no evidence that the White van trucks were not also left-over units or that there was a prohibition against their resale to veterans, veteran-dealers or non-veteran dealers.

Obviously a Chevrolet gunnery truck was of no value to anyone since it could not be used for war purposes or for anything but junk. The Government and police authorities would view the use of such a truck by a citizen as dangerous.

Although the WAA regularly noticed sales intended for veterans only whether for retention in the veteran's own business or for resale by a veteran dealer in the used car business, there is no evidence that there were any restrictions whatever placed by it on the resale of the Chevrolet or the White van trucks. The Chevrolet gunnery truck was a *left-over* unit after the veteran's sale had been concluded (R. 41-42) and, in

consequence, apparently was open for sale to any veteran or non-veteran without any agreement not to resell. Inasmuch as no evidence was introduced that the WAA placed restrictions on the sale to veterans and on a resale by them or to non-veterans on left-over units, Osaki's affidavit was not proved false in any material respect and he and Hildebrand, his partner, were not proved in this trial to have been guilty of making false mail order requests. De Bon had nothing to do with these mail order requests and had no knowledge whatever that they had been made or that they were required by the WAA to be made.

No evidence whatever was introduced showing that the sale of White van trucks was restricted to veterans or that they were not also left-over units available for sale to the public. If they fell into either classification Osaki's mail order request was not false for he was not bound to disclose therein that he was purchasing for resale purposes. His request, in consequence, was not false merely because he signed the mail order request in his own name.

V.

PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF.

The prosecution failed to prove that there was any prohibition placed by law upon Hildebrand and/or Osaki from reselling the cars to De Bon and, in consequence, the mail order requests were not false for Osaki acquired good and lawful title to the cars as the purchaser.

By the mail order requests Osaki applied for the purchase of the cars. Title thereto passed from the WAA (U. S.) to him. If he thereby violated any agreement impliedly made not to resell the cars, as charged in the indictment (R. 4), the WAA could have held him civilly liable therefore, but such an agreement would not bind De Bon or defeat the title De Bon received from Osaki upon payment of a valuable consideration and for which he received proper bills of sale. De Bon dealt with Hildebrand who held himself out to be in partnership in used cars as a veteran dealer in used cars and as being eligible and qualified to purchase surplus property.

We direct attention to the fact that the WAA appears to have recognized that the prohibition against resale was absurd in its very nature and that it sought to remedy the matter by an appendix provision specifically authorizing veterans to resell property. See *Lee v. U. S.* (CCA-6), 167 Fed. (2d) 137 at 140.

Further, we direct attention to the fact that a veteran could establish his status as a veteran dealer for resale purposes. There is no evidence in the record that Hildebrand as a veteran dealer lacked authority to resell and that De Bon had knowledge of his lack of authority. The burden rested on the prosecution to establish Hildebrand's lack of authority and De Bon's knowledge of this lack. This was a burden of proof placed upon the prosecution that it completely overlooked. A case is not made out by the prosecution unless it first proves that the acts alleged to be crim-

inal were criminal. Proof of Osaki's or Hildebrand's *lack of authority to resell* is an essential element of proof before a crime could be made out.

The burden of proof rested on the prosecution to establish evidence of guilt of each element of the offense charged. See, *Bollenbach v. U. S.*, 326 U.S. 607, 613; *U. S. v. Gooding*, 25 U.S. 460, 471, 478; *Benway v. Michigan* (CCA-6), 26 Fed. (2d) 168, 171, cert den. 278 U.S. 615. The prosecution herein failed to establish its burden of proof. The evidence was uncontradicted and conclusive that De Bon dealt with Hildebrand in the belief that Hildebrand was such a veteran dealer in partnership with Mee of Bakersfield although he did not know the partner to be Osaki until the time Osaki sold the cars to him.

VI.

PROSECUTION'S SUMMATION TO JURY SUGGESTING APPELLANT WAS GUILTY OF OTHER CONSPIRACIES DEPRIVED HIM OF A FAIR TRIAL.

The inadvertent reference made by counsel for the prosecution against the appellant to the jury appears in R. 226 in the following language:

> "Now, there were the two, one purchased on Hildebrand's priority and the other purchased, as we charge on Osaki's priority; and we have in this case confined ourselves to the operations between Osaki, Hildebrand, and De Bon. There may have been other conspiracies here * * *"

Although counsel for the appellant made a timely objection to that statement and the Court thereupon instructed the jury to disregard it the injury had been done and it was incurable. It is difficult enough for an accused to defend himself against serious accusations brought against him in an indictment—but it is practically impossible for him to defend himself against unfounded but equally damaging charges outside the indictment and the effect the suggestion of the commission of other offenses has on the charge being tried. The test would not seem to be whether the statement was intended to hurt but that it did its harm. Similarly, in libel and slander cases, the rule has been phrased that it is not the aim but the target that is hit that counts. The motion for a new trial should have been granted.

See,

U. S. v. McNamara (CCA-2), 91 Fed. (2d) 986, 992;

McKibben v. Philadelphia R. Ry. Co., 251 Fed. 577, 578-9.

See also:

Berger v. U. S., 295 U.S. 78, 86-89;

Crumpton v. U. S., 138 U.S. 361, 364;

Williams v. U. S., 168 U.S. 382, 398;

Paquin v. U. S., 251 Fed. 579, 580;

Sischo v. U. S., 296 Fed. 696.

VII.

CONVICTION, SENTENCES AND FINES ARE VOID FOR INFLICTING DOUBLE PUNISHMENT FORBIDDEN BY THE FIFTH AMENDMENT.

Count One charging defendants with a conspiracy to defraud the U. S. in making and causing fraudulent *applications* (Exh. 13 and 14) to be made for the purchase of White van trucks in the name of veteran Osaki for the benefit of non-veteran De Bon includes every element of the substantive offense charged in Count Three. In consequence, the imposition of the separate sentence and fine on Count One, followed by probation, and the separate fine imposed on Count Three constituted double punishment and jeopardy forbidden by the Fifth Amendment. See *Sealfon v. U. S.,* 68 S. Ct. R. 237, holding the doctrine of *res judicta* applicable where a conspiracy charge which resulted in an acquittal was held a bar to conviction on the substantive charge. See also *U. S. v. Adams,* 281 U.S. 202, 205, so holding where substantive charges were involved. See also, *Freemen v. U. S.* (CCA-6), 146 Fed. (2d) 978, 979, 980; *U. S. v. Rachmil* (DCNY), 270 Fed. 869; and *U. S. v. Clavin* (DCNY), 272 Fed. 975, 987. The doctrine of *res judicta,* or plea in bar, and also estoppel may be urged in criminal cases as well as the plea of double jeopardy. See *U. S. v. Oppenheimer,* 242 U.S. 85, 87; and *U. S. v. Holbrook* (DC Mo.), 36 F.S. 345, 348, and the plea of *autrefois acquit; In re Snow,* 120 U.S. 274, and *Ex parte Rose* (DC Mo.); 33 F.S. 941, 943, holding the imposition of consecutive sentences to be void.

The acquittal on the substantive charge of making a false mail order request contained in Count Two was *res judicata* on the same issues contained in conspiracy Count One, that is to say, on the mail order request for the Chevrolet truck.

See:

Sealfon v. U. S., 91 L. Ed. Adv. 215;
U. S. v. Adams, 281 U. S. 202, 205.

This leaves relevant to the case only the Count One conspiracy charge relating to the making of alleged false mail order requests for three White van trucks and the same issue involved in substantive charge in Count Three. We are not familiar with any precedent holding that the conspiracy charge is severable in nature. It would seem to be analagous to an egg which, if bad in a material respect, is wholly bad.

VIII.

ASSIGNED ERRORS IN INSTRUCTIONS TO JURY.

(1) The trial Court erred in refusing to instruct the jury that the testimony of codefendants who pleaded guilty should be viewed with caution.

The trial Court erred in refusing to instruct the jury that the testimony of codefendants Osaki and Hildebrand who had pleaded guilty to conspiracy Count One, the other counts thereupon being dismissed (R. 212), should be viewed with caution. The oral request for such instruction and the defendant

De Bon's objection to the Court's refusal to give it appears at R. 196, as follows:

Mr. Tramutolo. Your Honor, the one on which I wanted to address myself to the Court, and it may have been covered while I was writing, is the weight the jury must give to those who have pleaded guilty. I got just one portion of it, and I don't know whether the jury was instructed that their testimony should be viewed with caution because of the fact that they had pleaded guilty.

The Court. I have given that instruction with respect to the accomplices, and I feel it is covered. (This refers to such instruction at R. 185.)

There is a wide difference between the weight to be given to the testimony of persons asserted to be accomplices and convicted codefendants. The latter could be but by no means need be accomplices. There is no evidence in the record showing that Osaki and Hildebrand were accomplices of De Bon in any conspiracy. Their pleas of guilt to a conspiracy could not implicate De Bon but, from the instruction given on accomplices, under the circumstances, the jury might well have inferred or have been led to the conclusion that De Bon was a joint conspirator. In consequence, De Bon was entitled to the instruction he orally requested. The fact that appellant's request was oral instead of being requested in writing did not constitute a waiver of the instruction.

Bird v. U. S., 180 U.S. 350, 361-362.

(2) The trial Court erred in refusing to instruct the jury that the purchase of property from a veteran did not violate the Surplus Property Act.

The trial Court erred in refusing to instruct the jury that it was not a violation of the Surplus Property Act, for De Bon to purchase property from a veteran who received lawful title thereto from the WAA and that the Act provided no penalty for so doing. The oral request for such instruction and defendant De Bon's objection to the Court's refusal to give such an instruction appears at R. 196, as follows:

Mr. Tramutolo. The only other one, your Honor, I thought I had prepared for your Honor, was that it was not a violation of this Act to purchase property from a veteran when he acquires it himself, lawfully. In other words, there is no penalty on the Act.

The Court. Well, there is no such charge. There is no issue. You have argued that point to the jury, and I think very adequately, and you proposed no instruction on that situation and caution.

Mr. Tramutolo. I thought I proposed the one. That was the one I wanted to ask about.

The Court. No, there was none proposed. I noticed you argued it very fluently and adequately.

Argument of counsel before a jury on a question of law which is material to the case is no substitute for an instruction on the issue by the Court. Hildebrand had led De Bon to believe he was an authorized veteran dealer. Under the circumstances there was nothing wrong in his reliance upon that representa-

tion and his belief therein would relieve him from conviction for crime by reason of his lack of knowledge of Hildebrand's true status and his own lack of intent.

Further, if Hildebrand was a veteran dealer, he and his partner were authorized to resell items and, in consequence, none of them committed a wrong. De Bon was entitled to the requested instruction for said reasons.

A defendant is entitled to instructions on his theory of a case. The total failure of a trial Court to give an instruction on an issue raised by the evidence and the defendant's request for it constitutes reversible error. See, *McAffee v. U. S.* (CA-DC), 105 Fed. (2d) 21, 32; *Meadows v. U. S.* (CA-DC), 82 Fed. (2d) 881, 883; *Hersh v. U. S.* (CCA-9), 69 Fed. (2d) 799, 807. See also, *Sealfon v. U. S.,* 68 S. Ct. 237, at 240, which holds that even if an appropriate instruction on a material issue is not proposed by the parties that it is nevertheless, the duty of the Court to give such an adequate instruction on that issue and its failure so to do constitutes reversible error. See also, *Bird v. U. S.,* 180 U.S. 350, 361-2; and *Calderon v. U. S.* (CCA-5), 279 Fed. 556, 558, declaring the general rule to be that the Court must give pertinent instructions when its attention is directed to the defendant's theory of the case.

(3) The trial Court erred in instructing the jury that an aider and abettor is a principal.

The trial Court erred in giving the following instructions to the jury to the effect that an aider or abettor is criminally liable as a principal.

(R. 185-186.) I further charge that whoever directly commits an act constituting an offense defined in any law of the United States, or whoever aids, abets, conceals, induces, or procures its commission, is a principal, and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of law is a principal, and is also one who either aids, abets, conceals, induces, or procures the doing of an act or that act.

"Aid" and I am defining these for you because the definitions are essential in the trial of this case—"Aid" means "to help, support, assist; one who helps or promotes in doing something; helper or assistant".

"Abet" means "to instigate or to encourage by aid or countenance; or to contribute; as an assistant or instigator in the commission of an offense".

"It is essential to the guilt of a person charged with aiding and abetting the commission of a crime that such person's acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

"Usually to aid and abet in the commission of an offense, the person rendering such aid or assistance

is present to render support and confidence, but he may aid and abet even though absent.

"A person who renders assistance, cooperation and encouragement in the commission of an offense is one who aids and abets in the commission thereof."

Nowhere in the indictment is the appellant charged with having aided and abetted in the commission of any offense.

If the evidence showed anything, it showed De Bon did not and could not have joined in a common purpose with Osaki and Hildebrand, or with either of them, and had no intent to aid or encourage either of them and was not present at the making of the application, supplemental application or mail order requests. In consequence, there was no evidence that he aided or abetted them. He was not an accessory before the fact. See *Morei v. U. S.* (CCA-6) 127 Fed. (2d) 827, 830. Therefore, if the evidence discloses any connection whatever on the part of De Bon with the matter it could show, at most, that he was an accessory after the fact and hence he could not have been a principal and the instruction, given under 18 USC 550, was erroneous and prejudicial.

To be an aider or abettor under 18 USCA, sec. 550, in a felony case mere presence is not enough. There must be a common purpose and intent to aid or encourage the persons who committed the crime and an actual aiding and encouraging. An accessory before the fact is one who, though absent at the commission

of a felony, procures, conceals or commands annother to perpetrate it. Those present assisting are guilty as principals while those who are absent but who counseled it are accessories before the fact. An aider and abettor must be present when the crime is committed. If the evidence be deemed to show De Bon was an accessory after the fact the indictment fails for he was not so charged and there is a fatal variance between the charges brought and the crime proved. See *Morei v. U. S.*, supra.

(4) The trial Court erred in its statements of the law in response to questions put to the Court by the jury.

The Court erred in answering the following questions propounded by the jury to the Court, viz:

"(R. 202) The third question is, Can a dealer buy on a veteran's priority and sell to a non-veteran on a commission basis? That involves a mixed question of law and fact, and I regard the answer to that as completely removed from this case, because the transaction as elicited through the medium of the witnesses is either one thing or the other. * * *

(R. 203) The gravamen of this cause is not bottomed or predicated upon any sale. If there be a fraud perpetrated, it is in connection with the mail order sent to the War Assets, and other features of the transaction. No opprobrium attached to the alleged sale.

A Juror. If Mr. Hildebrand was a dealer, couldn't it be construed that a dealer is entitled to a commission for sale?

The Court: A dealer can deal in his own properties as such, but bear in mind in this case that Mr. Hildebrand was not dealing in his own priorities. Mr. Hildebrand was dealing in Osaki's priorities.

The Juror: What I mean is an innocent purchaser purchasing and paying commission, wouldn't that or couldn't that be constituted (considered?) a commission instead of—

The Court: That is for you. I am not to pass on that, sir. That is a matter for you to determine in the light of all the facts in this case.

The Juror: That is the reason we wanted to know what a dealer was.

The Court: I have defined it as best I can. I have given you the definition. I have read the Act."

The question whether a veteran dealer (Hildebrand) could buy on his own or his partnership's priority and thereafter sell to a non-veteran on a profit or commission basis was a question of law highly material to the issue involved. If such was permissible neither of the mail order requests, whether referable to Osaki's applications or viewed independently, could have been false in failing to disclose that the veteran purchaser then intended or later intended to resell the items to De Bon and no crime whatever was committed by any of the defendants.

The question whether Hildebrand was a veteran dealer, as the evidence disclosed he was in a partnership with a veteran engaged in the used car business

and that he informed De Bon that he was a veteran dealer, and, as such was entitled to a profit or commission on a sale, obviously required a jury instruction that a veteran dealer was entitled to a profit under such circumstances. The trial Court's answer that a dealer can deal in his own properties but that Hildebrand was not so doing but was dealing in Osaki's priorities was erroneous. That Court should have instructed the jury that if it found that De Bon believed in and relied upon the representation made by Hildebrand that he was a veteran dealer in partnership with a veteran in the used car business that Hildebrand and Osaki could charge De Bon a profit on the sales to him of the cars.

The trial Court's failure to answer the jurors' question whether or not an innocent purchaser could pay a commission or rather a profit on sales was an erroneous refusal to instruct on an issue of law involved in the case and raised by the evidence and was not a mere matter of fact to be determined by the jury.

Inasmuch as these questions of law were propounded by the jury to the Court and not by counsel for the defendant they were not excepted to, and, under the circumstances, the jury proposed them in lieu of the defendant and the Court erred in failing to give a proper instruction on this material issue. See *Bollenbach v. U. S.,* 326 U. S. 607, 612-4, where the Supreme Court stated:

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

"A charge should not be misleading. See Agnew v. U. S., 165 U. S. 36, 52."

See also: *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 617.

CONCLUSION.

For the foregoing reasons we urge that the judgment of the Court below be reversed.

Dated, San Francisco, California,
January 5, 1949.

Respectfully submitted,
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